UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

David Lane Johnson, Plaintiff, -v- National Football League Players Association, et al., Defendants.	No. 1:17-cv-05131 (RJS) Judge Richard J. Sullivan

Plaintiff David Lane Johnson's Counter Local Rule 56.1 Statement of Material Facts

Plaintiff David Lane Johnson ("Johnson"), as part of his Opposition to the National Football League Player Association's Motion for Summary Judgment, and pursuant to Local Rule 56.1(b), submits this Statement of Material Facts. Johnson does so despite that he has been denied discovery for the entirety of this case. The following headings and numbered paragraphs mirror those included in the Rule 56.1 Statement filed by the National Football League Players Association ("NFLPA") (Doc. No. 136):

I. THE NFLPA's OCTOBER 16, 2018 PRODUCTION OF DOCUMENTS

1. On October 16, 2018 the NFLPA produced to Johnson a portion of the NFL Policy on Performance-Enhancing Substances 2015 (the "Policy"). The NFLPA did not produce the entire Policy to Johnson. *See* Declaration of David Lane Johnson ("Johnson Decl.") at ¶ 4. At a minimum and without the benefit of any discovery, the NFLPA has not produced to Johnson the following documents: the amendment to the Certified Forensic Toxicologist provisions that apply to the 2015 Policy; the amendment allowing less than the required three to five arbitrators; the amendment regarding the two-year reasonable-cause testing period; and the

Policy's Collection Procedures, including, but not limited to, the collection protocols and specimen handling procedures. *See* Johnson Decl. at ¶ 4.

2. The NFLPA's October 16, 2018 production included:

i. An incomplete copy of the Policy (Johnson Decl. at ¶ 4);

ii. A letter dated April 22, 2013;

iii. A letter dated May 7, 2015 modifying the "2014 Policy on Performance-Enhancing Substances" and not the 2015 Policy applicable here; and

iv. Screen shots of player certifications regarding drug testing.

Prior to the NFLPA's October 16, 2018 production, the NFLPA had never produced the documents described in (ii) or (iv) to Johnson. Johnson Decl. at ¶ 6. Prior to his arbitration in October 2016, and prior to the date that Johnson filed the instant lawsuit, the NFLPA never provided the document described in (iii) to Johnson. Johnson Decl. at ¶ 12.

3. NFLPA counsel David Greenspan's October 16, 2018 letter speaks for itself. The letter is not a sworn statement, does not indicate that Greenspan is an NFLPA records custodian and does not otherwise comport with Federal Rule of Evidence 803(6). Additionally, for reasons stated in Paragraph No. 1 above, Johnson disagrees that the NFLPA produced all documents relevant to the Policy, as part of its October 16, 2018 production. *See* Johnson Decl. at ¶¶ 4-5, 11-12.

II. THE NFLPA HAS [NOT] PRODUCED TO JOHNSON ALL DOCUMENTS RELATING TO THE 2015 POLICY

4. Absent an opportunity to depose the NFLPA and its labor counsel Stephen Saxon, Johnson cannot attest to the accuracy of the statements made by the NFLPA in Paragraph No. 4 of the NFLPA's Rule 56.1 Statement.

5. Again, absent an opportunity to depose Mr. Saxon, Johnson cannot attest to the accuracy of the statements made by the NFLPA in Paragraph 5 of the NFLPA's Rule 56.1 Statement. However, as detailed in Paragraph No. 1 above, the NFLPA's October 16, 2018 production did not include all documents relating to the Policy.

6. Again, absent an opportunity to depose Mr. Saxon and test his credibility, Johnson is unable to fully oppose Mr. Saxon's statements and beliefs. What Mr. Saxon believes is not fact. Additionally, Mr. Saxon's belief that "there is no—side agreement relating to the bargaining parties' interpretation of the timeline for reasonable-cause testing" is contradicted by both the findings of this Court (*see* Doc. No. 125 at 12) and the findings of Arbitrator Carter (*see* Doc. No. 39-2 at ¶ 6.15). Furthermore, the NFLPA agreed with Johnson's interpretation of the reasonable-cause testing period prior to Johnson's arbitration only to reverse course and state that the NFL and NFLPA had agreed to a different agreement at Johnson's arbitration. *See* Johnson Decl. at ¶ 11. Furthermore, Dr. John Lombardo testified that he presented to the NFLPA and NFL "what [he] was going to do" as to the application of the testing period. Doc. No. 3-10 at 170:4-17. Dr. Lombardo's application modified the plain terms of the Policy, and under the Labor Management Reporting and Disclosure Act ("LMRDA"), the NFLPA was required to produce this modification to Johnson upon his request. If this amounted to an oral modification, the LMRDA required the NFLPA to memorialize the oral modification and provide its memorialization to Johnson upon his request. *See* U.S. Department of Labor's Office of Labor-Management Standards' Interpretive Manual at § 110.305. Despite Johnson's request, the NFLPA has not done this. *See* Johnson Decl. at ¶ 4.

7. Absent an opportunity to depose Heather McPhee and test her credibility, Johnson is unable to fully oppose Ms. McPhee's statements and beliefs and cannot attest to the accuracy

of the statements made by the NFLPA in Paragraph No. 7 of the NFLPA's Rule 56.1 Statement. Regardless, what Ms. McPhee believes is not fact. Additionally, the evidence suggests that there may be oral agreements to the Policy. *See* Johnson Decl. at ¶¶ 4, 11; *see also* Doc. No. 61-3 at 12:6-19:22.

8. The NFLPA has produced to Johnson its agreement with the NFL (dated December 1, 2016) appointing Arbitrator Shyam Das to serve as the third arbitrator under the Performance-Enhancing Substances Policy and the Policy and Program on Substances of Abuse. The NFLPA and NFL entered into this agreement, which is dated December 1, 2016, after Johnson's arbitration, which took place on October 4, 2016. The Policy requires three to five arbitrators be available for appeals. *See* Doc. No. 39-1 at 13-14. The NFLPA has never produced any agreement, oral or written, permitting the Policy to operate with two arbitrators. *See* Johnson Decl. at ¶ 4. Moreover, the NFLPA has taken a contrary position in another federal proceeding stating in that proceeding that the NFLPA and NFL agreed to a "modification" of the Policy's three to five arbitrator requirement to allow only two arbitrators and suggested the modification could be oral. *See* Doc. No. 61-3 at 12:6-19:22.

9. Arbitrator Carter's October 11, 2016 Arbitral Award (Doc. No. 39-2) speaks for itself. Furthermore, Johnson's LMRDA claim was not before Arbitrator Carter, and Arbitrator Carter's statements on matters related to Johnson's LMRDA claim are not entitled to deference. The NFLPA improperly conflates the deference owed Arbitrator Carter's comments for purposes of Johnson's request to vacate the Arbitral Award with Johnson's LMRDA claim. Regardless, Arbitrator Carter determined that the NFLPA and NFL "agreed" how the reasonable cause testing period would be applied. *See* Doc. No. 39-2 at ¶ 6.15.

10. Arbitrator Carter's October 11, 2016 Arbitral Award (Doc. No. 39-2) speaks for itself. Furthermore, Johnson's LMRDA claim was not before Arbitrator Carter, and Arbitrator Carter's statements on matters related to Johnson's LMRDA claim are not entitled to deference. Regardless, the Arbitral Award fails to state that the collection procedures and laboratory protocols are "not any collectively-bargained agreement between the NFL and NFLPA" as incorrectly claimed by the NFLPA. *See* Doc. No. 39-2. The NFLPA's suggestion that Arbitrator Carter made such a finding is false. *See* Doc. No. 39-2. Rather, the collection procedures and laboratory protocols are expressly referenced in and made a part of the Policy (*see* Doc. No. 39-1), and the LMRDA required the NFLPA to provide them to Mr. Johnson upon his request. *See* U.S. Department of Labor's Office of Labor-Management Standards' Interpretive Manual at § 110.300.

11. The NFLPA has produced an amendment regarding the CFT to the 2014 Policy on Performance-Enhancing Substances. The NFLPA has not produced an amendment regarding the CFT to the 2015 Policy applicable here. *See* Johnson Decl. at ¶ 4.

III. ADDITIONAL FACTS IN SUPPORT OF JOHNSON'S OPPOSITION TO THE NFLPA'S MOTION FOR SUMMARY JUDGMENT

12. Johnson publicly questioned the representation the NFLPA provided him, including, but not limited to, stating, "the NFLPA does not stand up for players." In response, among other things, based on media reports, the NFLPA publically attacked Johnson and made false statements to the media about him. *See* Johnson Decl. at ¶ 2.

13. On multiple occasions, Johnson requested copies of the Policy, including documents that are part of the Policy and amendments, modifications, side letters, deviations, etc. to the Policy. Johnson made these requests both before and at the time of the arbitration of his discipline appeal on October 4, 2016. Johnson requested from the NFLPA both any oral and

written amendments, modifications, side letters, deviations, etc. to the Policy. In response to one of Johnson's many requests for Policy documents, the NFLPA told him to obtain the requested documents from the National Football League ("NFL"). *See* Johnson Decl. at ¶ 3.

14. On October 16, 2018, the NFLPA produced only a portion of the Policy, including some of the agreements made under the Policy. To this day, the NFLPA has never produced the entire Policy to Johnson. At a minimum, the NFLPA has not produced to Johnson the following Policy documents: the amendment to the Certified Forensic Toxicologist provisions that applies to the 2015 Policy; the amendment allowing less than the required three to five arbitrators that applied at the time of Johnson's arbitration; the amendment regarding the two-year reasonable-cause testing period, including Dr. John Lombardo's proposed modifications to the Policy, which the parties accepted and agreed to; and the Policy's Collection Procedures, including, but not limited to, the collection protocols and specimen handling procedures. To the extent any of these amendments were oral, the NFLPA has not produced to Johnson a writing detailing the terms of any oral amendment to the Policy. *See* Johnson Decl. at ¶ 4.

15. To date, Johnson has not received a complete copy of the Policy. *See* Johnson Decl. at ¶ 5.

16. Absent a complete copy of the Policy, it was impossible for Johnson to evaluate his rights under the Policy. Having a complete copy of the Policy, including all portions deemed part of the Policy under the Labor Management Reporting and Disclosure Act, would have helped Johnson evaluate his rights under the Policy, including how best to appeal his discipline. *See* Johnson Decl. at ¶ 7.

17. Johnson has expended significant time, money, and resources seeking to enforce his rights under the Labor Management Reporting and Disclosure Act. *See* Johnson Decl. at ¶ 8.

18. The NFLPA's treatment of Johnson and retaliation of Johnson has damaged Johnson's reputation. *See* Johnson Decl. at ¶ 9.

19. The NFLPA's retaliation of Johnson, includes, but is not limited to, the following:

- Refusing to provide him a full explanation/copy of the Policy, including all modifications, side letters, etc. in violation of the Labor Management Reporting and Disclosure Act;
- Colluding with the NFL to sabotage Johnson's discipline appeal;
- Refusing to assist Johnson with his discipline appeal; and,
- Refusing to state its support for Johnson at his discipline appeal.

See Johnson Decl. at ¶ 10.

20. Despite Johnson's requests for information related to the agreement regarding the application of the Policy's two-year reasonable cause testing period, the NFLPA never shared its knowledge with Johnson. Instead, the NFLPA could not explain how the two-year testing period worked, failed to provide Johnson any information from Dr. Lombardo, and indicated no such agreement existed. Up to Johnson's arbitration on October 4, 2016, the NFLPA supported and agreed with Johnson's plain reading of the two-year period set forth in the Policy, including that the NFL should not have subjected Johnson to reasonable cause testing at the time of his "positive" test. The NFLPA's statements that no such amendment or alteration to the simple and straightforward language in the Policy existed strengthened Johnson's resolve to appeal his discipline. Johnson relied on the NFLPA's false statements to form part of the basis for the appeal of his discipline. It was not until Johnson's arbitration hearing that the NFLPA suggested that it knew of this Policy agreement/modification requiring a different reading of the two-year period than that set forth by the clear language in the Policy. To date, the NFLPA has not provided this agreement/modification to Johnson. *See* Johnson Decl. at ¶ 11.

21. In a separate federal case, the NFLPA previously stated that it and the NFL "mutually consented to modify" the Policy's sister policy the Policy and Program on Substances of Abuse to allow for only two arbitrators. *See* Ex. 3 to Johnson's Opposition to the NFLPA's Motion for Summary Judgment (NFLPA "Position Statement [Corrected]") at 2; *see also* Ex. 3 at 6 (same). As part of that same case, the NFLPA stated that, as of December 2016, the NFLPA was unsure whether the modification allowing only two arbitrators was in writing but that the modification applied to the Policy and Program on Substances of Abuse and the Policy at issue in this case "for a couple of years". *See* Ex. 4 to Johnson's Opposition to the NFLPA's Motion for Summary Judgment (hearing transcript) at 12:6-14:20. NFL in-house attorney Kevin Manara also stated, during Johnson's arbitration, "the bargaining parties agreed on their own to hire two arbitrators, instead of three." Doc. No. #52-6 at 18:25-19:2; *see also* Doc. No. 52-6 at 20:12-16 ("we agreed that we would hire two arbitrators"). The declarations from Saxon and McPhee on which the NFLPA relies to support its Motion for Summary Judgment directly contradict these prior inconsistent statements by the NFLPA and the NFL.

22. The NFLPA continues to reference a letter amending the 2014 policy on performance-enhancing substances (*see* Doc. No. 137-7) -- not the 2015 Policy applicable here. The NFLPA suggests the amendment applies going forward but has not explained why the NFL and the NFLPA specifically incorporated the amendment into the 2016 version of the performance-enhancing substances policy and all subsequent versions, but did not include it in the 2015 Policy requested by Johnson. *See* Doc. No. 39-1.

23. The NFL has admitted "protocols" exist under the Policy, which have been withheld from Johnson. *See* Doc. No. 116-20 ("Had Mr. Johnson's specimen tested positive for substances other than [REDACTED] the ***corresponding protocols would have been included***" in

what was produced) (emphasis added) (this email is also Ex. 6 to Johnson's Opposition to the NFLPA's Motion for Summary Judgment). The NFLPA received this email and never refuted the protocols' existence. *See* Doc. No. 116-20. The Policy references and incorporates the entirety of the protocols, not just those applicable to the substance for which Johnson allegedly tested positive. *See* Doc. No. 39-1. While Johnson requested all protocols, including those the NFL previously identified as withheld from him, the NFLPA has never produced them to Johnson. *See* Johnson Decl. at ¶¶ 3-5. The NFLPA's October 16, 2018 letter does not address and is completely devoid of the protocols the NFL identified. *See* Doc. No. 137 at Ex. A-1. Based upon this email alone (Doc. No. 116-20), an email that the NFL copied the NFLPA, including McPhee, it is beyond dispute that the NFLPA has not produced the complete Policy. The McPhee and Saxon affidavits stating the opposite are false and create genuine issues of material fact.

24. The NFLPA has not explained how the CFT amendment to the 2014 policy applies to the 2015 Policy applicable here, particularly where the 2016 policy incorporates this CFT amendment but the 2015 Policy does not. *See* Ex. 2 to Johnson's Opposition to the NFLPA's Motion for Summary Judgment (NFL Policy on Performance-Enhancing Substances 2016) at 28 (previously filed at Doc. No. 61-2); *compare* Doc. No. 39-1 at 27.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 16, 2019 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

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